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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 507

ALFRED SYLVANUS, ARCADIA NATIONAL INSURANCE COMPANY and VOYLE CLARK JOHNSON, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 919-937) is reported at 192 F. 2d 96.

JURISDICTION

The judgments of the Court of Appeals were entered on April 26, 1951 (R. 938-939), and petitions for rehearing (R. 945-1016) were denied on December 1, 1951 (R. 1017). The petition for a writ

of certiorari was filed on December 31, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether prosecution of petitioners for fraudulent use of the mails in selling insurance was barred by the provisions of the McCarran Act (15 U.S.C. 1011-1015), permitting the states to regulate the business of insurance.

2. Whether the evidence was sufficient to sustain the conviction of petitioners.

3. Whether the overt acts alleged in the conspiracy to have been committed within the period of limitations were acts in furtherance of the conspiracy.

STATUTES INVOLVED

18 U.S.C. 88[1] (35 Stat. 1096) provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000,

[1] This statute was repealed by the Act of June 25, 1948, c. 645, sec. 21 (62 Stat. 862), effective September 1, 1948, and is now covered by 18 U.S.C. 371.

or imprisoned not more than two years, or both.

18 U.S.C. 338[2] (35 Stat. 1130) provided in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement,

[2] This section was also repealed by the Act of 1948 (see fn. 1, *supra*) and is now covered by 18 U.S.C. 1341.

shall be fined not more than $1,000, or imprisoned not more than five years, or both.

15 U.S.C. 1011 (59 Stat. 33) provides:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. 1012 (59 Stat. 34, as amended, 61 Stat. 448) provides:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the

business of insurance to the extent that such business is not regulated by State law.

STATEMENT

On September 10, 1948, an indictment, containing eighteen counts (R. 2-19), was returned against petitioners, jointly, in the United States District Court for the Northern District of Illinois. The first seventeen counts (R. 2-16) charged unlawful use of the mails, between 1945 and 1947, in furtherance of a scheme to defraud by false representations regarding liberal accident and health benefits payable under policies of insurance. Count eighteen (R. 16-19) charged that, between 1938 and 1948, petitioners conspired to violate the Mail Fraud Act by agreeing to solicit mail orders for health and accident insurance policies purporting to provide liberal benefits, whereas, in fact, the policies contained very restricted provisions.[3]

Following a trial by jury, petitioners were found guilty on fourteen counts, including the conspiracy count (R. 374).[4] Sylvanus was sentenced to three

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[3] The conspiracy count alleged 15 separate overt acts occurring between October 14, 1938, and January 1, 1947 (R. 17-19). The last four overt acts charged involve the following: (1) incorporation of Arcadia Life and Casualty Company by Sylvanus on October 1, 1945; (2) election of Sylvanus as director of that company on October 1, 1945; (3) incorporation of petitioner Arcadia National Insurance Company on January 1, 1947; and (4) election of Sylvanus as its director on January 1, 1947 (R. 18-19).

[4] Counts 5, 7, 8 and 10 of the indictment were dismissed on motion of the Government at the end of its case (R. 29, 154).

years' imprisonment on each of the thirteen substantive counts and to two years on the conspiracy count, the terms to run concurrently (R. 377, 866); Johnson to eighteen months' imprisonment on each of the fourteen counts, the terms to run concurrently (R. 377, 867); and the corporation to a fine of $1,000 on each of the thirteen substantive counts, and $10,000 on the conspiracy count, the payment of $10,000 to discharge all fines on all counts (*id.*). On appeal, the judgments of conviction were affirmed (R. 938-939).

The evidence adduced by the Government tended generally to prove the following:

During the period between October 1938 and January 1939, Sylvanus and a group of associates organized in the State of Illinois the Arcadia Mutual Casualty Company, one of the predecessors of the corporate petitioner, for the purpose of insuring members "against bodily injury, disablement or death by accident and against disablement resulting from sickness or old age or any insurance appertaining thereto" (R. 36, 56; Gov. Ex. 1, R. 35, 380-382). Sylvanus became its president and actively managed its affairs. He was the only officer drawing a salary (R. 56; Gov. Exs. 50, 51, 51-A, R. 58, 662-665).[5]

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[5] In 1945, Arcadia Mutual consolidated with a reserve life insurance corporation (of which Sylvanus was also president) to form a new corporation, Arcadia Life and Casualty Com-

The company first sold only policies described as "Security Accident and Sickness" policies, having limited health and accident benefits, at a premium rate of one dollar a month or eleven dollars a year (Gov. Ex. 9, R. 40, 469; Gov. Ex. 51-A, R. 58, 671). In 1943, it began to issue "American Sentinel Complete Coverage Accident and Sickness Policy" providing for special double and triple indemnities (Gov. Ex. 51-A, R. 58, 671; Gov. Ex. 13, R. 40, 469).

On January 11, 1939, a general agent's contract was entered into by the company with one Loeb, who, shortly thereafter, with the former's consent, assigned it to International Insurance Agency, Inc. (Gov. Ex. 5, R. 39, 421-427). The agency, occupying the same offices as Arcadia, was operated by Sylvanus, who owned 51% of its stock and was its only salaried employee (R. 38, 145, 150). The contract authorized the agency to advertise and sell at its own expense insurance policies of Arcadia for commissions of 75% of the first monthly premiums and 60% of all subsequent premiums

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pany (R. 36, 56; Gov. Ex. 2, R. 35, 393-400). The following year the new organization changed its corporate name to Arcadia National Insurance Company, petitioner herein (R. 36, 56; Gov. Ex. 3, R. 35, 400-403; Gov. Ex. 50-51-A, R. 58, 665). The corporate set-up remained undisturbed and Sylvanus continued in control as president through the series of corporate changes (*id.*).

(Gov. Ex. 5, R. 39, 424, 425).[6] All advertising matter was, however, to be submitted to the insurance company for its approval (Gov. Ex. 5, R. 39, 426). The functions of underwriting and the settlement of claims remained in the company (Gov. Ex. 5, R. 39, 421, 422).

On February 24, 1944, Arcadia made a similar general agency contract with petitioner Johnson, who was doing business as the United States Insurance Agency (Gov. Ex. 8, R. 39, 458-468).[7] It authorized Johnson to advertise, sell and deliver at his own expense, the company's insurance policies in consideration of a commission of 70% of the first monthly premiums and 50% of all subsequent premiums (Gov. Ex. 8, R. 39, 463, 464, 467). The contract also provided that all advertising literature receive the company's approval and re-

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[6] Shortly after its date, the contract was amended, authorizing the agency to receive commissions of 75% of the first monthly premiums and 70% of all succeeding premiums on all Security policies sold (Gov. Ex. 5, R. 39, 432-433, 428; Gov. Exs. 9-12, R. 40, 469). By another amendment to the contract, the agency was authorized to advertise and sell the Complete Protection policies on commissions of 60% of all monthly premiums (Gov. Ex. 5, R. 39, 435; Gov. Ex. 13, R. 40, 469-470). There were further amendments to the contract which permitted the agency to receive, in addition to the commissions received on policies sold by it, an average of 10% overriding commission on all policies issued by the insurance company (R. 145, 149-150; also Gov. Ex. 5, R. 39, 427, 433).

[7] The Arcadia Mutual procured and paid for the agency license issued by the State of Illinois to the United States Insurance Agency (R. 44).

served to the company the functions of underwriting and the settlement of claims (Gov. Ex. 8, R. 39, 459-460, 465, 466, 467).[8]

The agencies undertook the promotion, on a nation-wide scale, of Arcadia's insurance business. Voluminous circular form letters, on Arcadia's letterheads, were sent through the mails and numerous advertisements were placed in various publications transmitted through the mails (R. 38, 42, 49-52, 54, 57, 61, 113; Gov. Ex. 176, R. 124, 724-728; Gov. Exs. 52-76, 79-81, 86, 111, 114, 119, 123, 175, R. 65, 114, 61, 69, 79, 75, 81, 107, 118, 100, 104, 94, 673-709, 710, 711, 715, 716, 717, 719). Between 1946 and 1947, Johnson's agency alone had arranged for the mailing of not less than one million advertisement postcards, in addition to hundreds of thousands of circular form letters (Gov. Ex. 176, R. 124, 725-726). Although all advertising was contracted for through the various agencies at their expense, the advertisements themselves, including the circular form letters, always carried Arcadia's name and were approved by Sylvanus

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[8] Arcadia Mutual had negotiated similar contracts with two other agencies to promote its "Security" type insurance on commissions of 70% on first monthly premiums and 50% and 55% of all subsequent premiums (Gov. Exs. 4, 6, R. 144, 39, 411-420, 436-445). And it had the same type of contract with still another agency, which was authorized to promote solely the "Complete Protection" type of policies at a commission of 50% of all premiums collected during the first year on policies sold by the agency and 45% on all subsequent premiums (Gov. Ex. 7, R. 39, 446-458).

(R. 38, 42, 56, 61; Gov. Ex. 176, R. 124, 728, 732). The nature of the advertising appears from the examples set forth in the opinion of the Court of Appeals (R. 922-927). The indictment charged (R. 6), and the evidence established the following representations with respect to the Security type policy (Gov. Exs. 52-57, 61, 67-76, 79, 111, 114, 119, 123, R. 65, 114, 69, 79, 107, 118, 100, 104):

(a) That the Security Policy would provide cash and sheltering protection to the holders of the said Security Policy if their income should be stopped on account of sickness or accident.

(b) That the Security Policy was easy to understand.

(c) That the Security Policy provides sympathetic, true-hearted protection against sudden emergency.

(d) That the payment of benefits is guaranteed by this old, reliable insurance company.

(e) That the Security Policy pays benefits of $5,000 to $8,000 for "accidental death" and $100.00 per month benefits for disability due to sickness or accident.

(f) That the sheltering protection of the Security Policy provides for doctor bills, medicine, hospital, nursing care, groceries and milk.

(g) That the defendants take the applicant's word that he is now in good physical condition.

(h) That the families of policyholders need never wonder about money on hand when sickness or accident strikes.

Actually, the benefits payable under the policies were very limited. The maxima of $5,000 and $8,000 for accidental death were payable only after the policy had been in force for five years, and only if the accident occurred while the insured was riding in a public carrier. The weekly indemnity of $25 for total disability caused by accident was limited to certain specified accidents, excluding most common accidents. The benefits for illness were payable for not more than eight weeks after the first seven days of illness, only if resulting from certain enumerated illnesses, and only if the insured was thereby prevented from transacting business, confined to his house and attended by a physician at least once a week.[9] (See Gov. Exs. 9-12, R. 40, 469.)

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[9] An expert testified for the Government that of the 55 specified diseases listed in Part IX of the policies, six of them are non-confining; two would confine for less than seven days; and that one is hereditary and consequently excluded from coverage by Part XIII, as being a pre-existing condition; that four of the afflictions listed would be fatal in less than seven days, and one does not occur in persons 16 years of age or over (R. 135, 136). In five instances, the list includes double medical designations for one disease (R. 135).

With respect to the Complete Protection type of policy, it was charged (R. 6-7), and proved, that the following representations were made (Gov. Exs. 58-60, 62-66, 80-81, 86, R. 65, 114, 75, 81):

(a) That the Complete Protection Policy had no loopholes, no ifs, ands, or buts, no tricky wording and no legal catch phrases to keep the policyholder from collecting benefits should sickness or accident befall.

(b) That the persons insured under the Complete Protection Policy can collect $100 a month for sickness or accident without limitation upon the type of sickness or accident.

(c) That the Complete Protection Policy pays $3000 for loss of limbs or sight, and $3000 for accidental death, without limitation upon the nature of the accident causing death.

(d) That the defendants have paid thousands of claims fully, quickly, and to the complete satisfaction of the policyholders.

(e) That the Complete Protection Policy gives its holders unlimited protection 24 hours a day, at work or play.

Actually, the $3,000 maximum for accidental death or dismemberment was payable only if the insured was "a fare-paying passenger within the enclosed part of a railway car, elevated, subway or

interurban railway car, electric street car or steamboat," and was injured or died, "independently and exclusively of disease and all other causes," as a result of a "travel accident," which wrecks the conveyance. If the accidental injury resulted in infection, payment was to be made as for sickness insurance, and not for accident. The monthly benefits for total disability, advertised as payable at $100 a month, were payable at the rate of $50 for the first 30 days, commencing with the seventh day after the first treatment by a physician. $100 was payable thereafter, but the total period of payment was not to exceed ten weeks. The monthly indemnity for illness was limited to certain diseases, payable at $25 for the first 30 days, commencing with the eighth day following treatment, with subsequent payments of $100 per month, the total period of payment not to exceed 8 weeks. (See Gov. Ex. 13, R. 40, 469).

During the period 1939-1946, there were 4,455 claims filed against Arcadia under the various policies, 71% of which were rejected (R. 147, 151, 154). Under the company's practice, it required an average of 52 days to process a claim, and the amounts paid on individual claims were small, even in cases of serious and crippling accidents (R. 147, 66-120; Gov. Exs. 15-34, 37, 47, R. 105, 75, 69, 104, 118, 94, 81, 92, 110, 112, 116, 98, 79, 89, 83, 87, 107, 109, 100, 101, 103, 96, 471-662). Once a claim had been disposed of, it was the practice for Sylvanus to reassess the risk involved in light of the new infor-

mation disclosed by the claim forms, and, if the insured's health had been impaired, to cancel the policy, no matter how long it had been in force (R. 47).

In 1940, the Department of Insurance of the State of Illinois notified Arcadia that "we note instances where general maximum statements are made regarding the terms of policies issued by your company which appear to be misleading if not misrepresentative," pointing out several instances (Gov. Ex. 180, R. 125, 738-739). Consequently, it had enjoined the company from issuing any advertising matter without the department's prior approval (*id.*). After a series of conferences between the department and the company, relative to a revision of the text of Arcadia's advertising literature, the department removed its restriction against its advertising (Gov. Ex. 180, R. 125, 734-765). But the literature that followed incorporated many of the features that the department found objectionable (*id.;* Gov. Exs. 52-76, 79-81, 86, 111, 114, 119, 123, 175, R. 65, 114, 61, 69, 79, 75, 81, 107, 118, 100, 104, 94, 673-709, 710, 711, 715, 716, 717, 719).

ARGUMENT

1. Petitioners contend (Pet. 25-33) that the McCarran Act (15 U.S.C. 1011-1015, *supra,* pp. 4-5) precludes prosecution of insurance companies for mail fraud. The McCarran Act was enacted for the specific purpose of offsetting the effect of the ruling in *United States* v. *South-Eastern Under-*

writers Association, 322 U.S. 533, that interstate insurance transactions constitute interstate commerce and are within the prohibitions of the federal antitrust laws. *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, 414, 429; S. Rep. 1112, 78th Cong., 2d Sess.; H. Rep. 143, 79th Cong., 1st Sess.; 91 Cong. Rec. 1474-1489. The purpose of the Act was to preserve the "continued regulation of the business of insurance by the respective States". H. Rep. 143, 79th Cong., 1st Sess., p. 2.[10]

Nothing in this legislation or its history suggests a purpose of Congress to permit insurance companies to use the mails in violation of the United States postal laws. The Mail Fraud Act does not purport to regulate an insurance business or any other business, whether traditionally within the scope of state or of federal regulation. The act is grounded on the constitutional power of Congress to regulate post offices and post roads (U. S. Const., Art. I, sec. 8, cl. 7). It undertakes merely to regulate the mails and does not proscribe the fraudulent

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[10] "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.*" Id. p. 3. See also S. Rep. No. 1112, 78th Cong., 2d sess.: "[The bill] would affirm the intent of the Congress that the regulation of the business of insurance remain within the control of the several States, *where it now exists*" (p. 3); "*the preservation* of State regulation of insurance" (p. 7). (Emphasis supplied.)

scheme for the execution of which the mails are employed. Congress has forbidden the use of the mails "in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not." *Badders* v. *United States*, 240 U.S. 391, 393. Thus, the application of the Mail Fraud Act to the use of mails in execution of a fraudulent scheme conducted by a duly licensed insurance company, or any other lawful enterprise, does not have the effect of invalidating, impairing or superseding any state legislation regulating the business. Accordingly, as the court below pointed out, if petitioners, "in conducting an otherwise legal business, engaged in a fraudulent course of conduct, whether that conduct was or was not approved by the state administrative office is wholly immaterial" (R. 931).[11]

2. The sufficiency of the evidence to support the conviction sufficiently appears from the facts set

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[11] The court did say that if it were a fact that the state had previously approved the advertising literature used by petitioners, such fact would have been "one of the circumstances bearing upon the question of good faith, *Hawley* v. *United States*, 133 F. 2d 966 (C. A. 6), but not decisive of the ultimate issue" (R. 931). However, after reviewing the advertising material used by petitioners following the insurance department's revision, the court below found that it "contained most if not all the features which the Department had previously found objectionable" (R. 928; compare R. 734-765 with R. 637-707, 710-711, 715-717, 719). The trial court instructed the jury that state approval was a circumstance to be considered on the question of petitioners' good faith (R. 370).

forth in the Statement, *supra,* and the opinion of the Court of Appeals (R. 922-930).

There is no merit in petitioners' contention (Pet. 38-40) that, since the advertisements and circulars did not purport to include all the terms of the policy, but referred the reader to the policy itself for specification and amplification, such advertisements could not be held to be deceptive. The issue is not whether a policyholder was bound by the limited provisions of the policy, but whether the advertisements were calculated to mislead the public as to the true nature of the policy and the scope of coverage afforded thereunder. The purpose of the Mail Fraud Act is to protect the public against all intentional efforts to despoil. *Durland* v. *United States,* 161 U.S. 306; cf. *United States* v. *Buckner,* 108 F. 2d 921 (C.A. 2), certiorari denied, 309 U.S. 669. Of course, once the insured had accepted the policy he would be bound by its terms in any civil litigation based on the policy as was the case in *Bowers* v. *Washington Times Co.,* 65 F. 2d 200 (C.A.D.C.), which petitioners cite (Pet. 38-40) as being in conflict with the decision of the court below. The two situations are, however, quite dissimilar. Whatever may be their civil liability, petitioners cannot escape their liability under the Mail Fraud Act by claiming that the public should have suspected their honesty. Accordingly they were not entitled to have the jury instructed that it was incumbent upon the insured to read his policy in order to ascertain the conditions contained therein.

3. Petitioners attack the conspiracy count (Pet. 11-13, 35-37) on the ground that the four overt acts alleged to have been committed within the period of limitations are insufficient, "because none commits the supposed conspirator to the criminal act alleged to have been contemplated." In view of the fact that the prison sentences of the individual petitioners were concurrent and payment of the fine imposed on any ten of the substantive counts would discharge the liability of the corporate defendant, this issue, relating only to the conspiracy count, could not affect the judgment in this case. In any event, the various acts relating to the organization and operation of the series of Arcadia companies, their financing and the negotiation of the agency contracts, although innocent in themselves, clearly constituted "overt acts," since they were done with the purpose of putting the unlawful agreement into effect. *United States* v. *Holte,* 236 U.S. 140, 144; *Kaplan* v. *United States,* 7 F. 2d 594 (C.A. 2), certiorari denied, 269 U.S. 582; *Collier* v. *United States,* 255 Fed. 328 (C.A. 5).

These acts were not, as in *Fiswick* v. *United States,* 329 U.S. 211, 217, acts tending merely to continue the results of a completed conspiracy; they were acts in furtherance of a continuing conspiracy. The prosecution was therefore not barred until three years after the commission of the last overt act alleged and proved. *Brown* v. *Elliott,* 225 U.S. 392; *United States* v. *Johnson,* 165 F. 2d

42 (C.A. 3), certiorari denied, 332 U.S. 852; *United States* v. *Lewis,* 161 F. 2d 683 (C.A. 2).

CONCLUSION

The judgment below is correct, and no conflict of decisions or question of general importance is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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